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IN THE

Supreme Court of the United States

OCTOBER TERM—1949

DOROTHY CASEY, as Administratrix of the Estate of JAMES J. CASEY, deceased,

Petitioner-plaintiff,

—against—

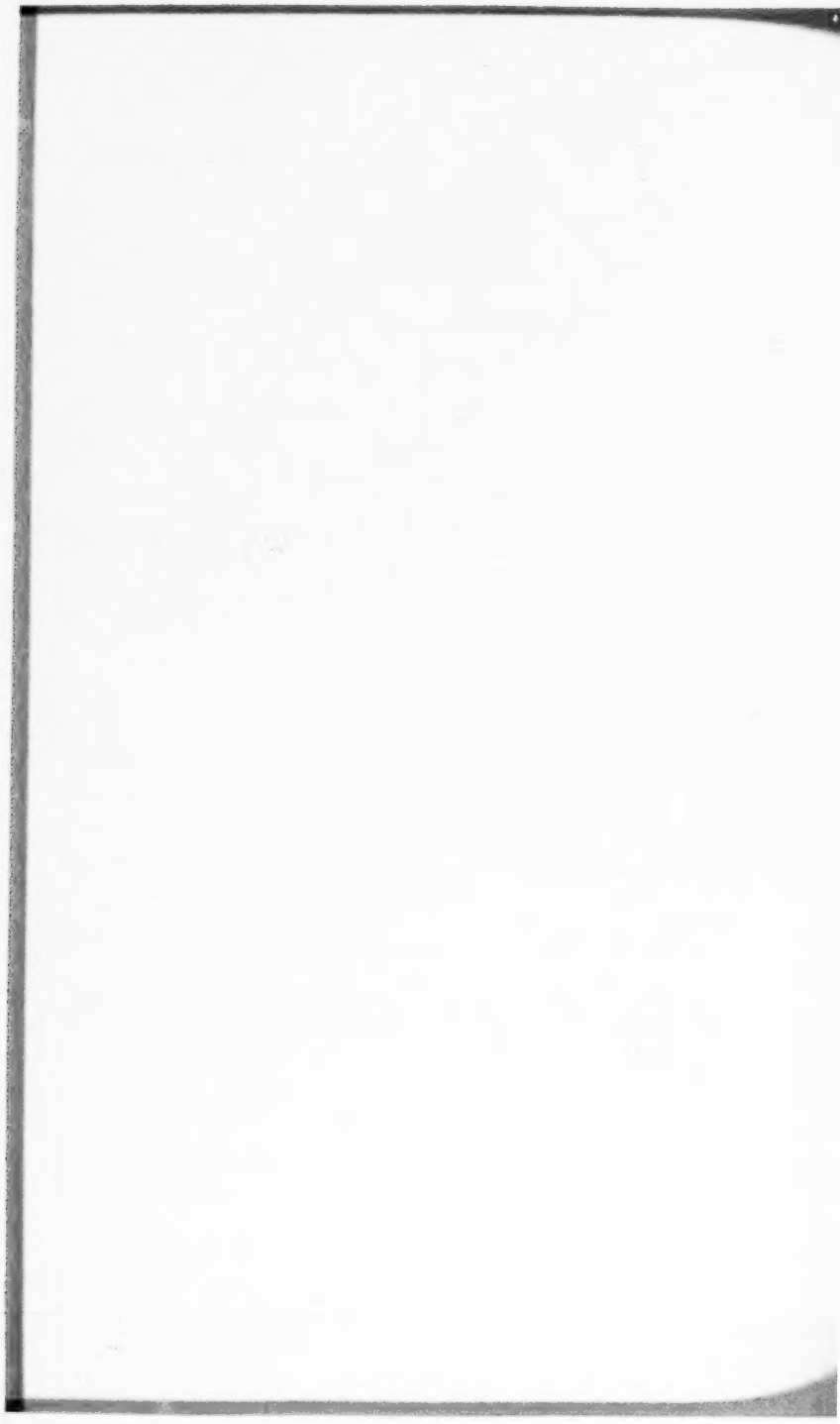
AMERICAN EXPORT LINES, INC.,

Respondent-defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JACOB RASSNER
Attorney for Petitioner.

HARRY EISENBERG and ROBERT KLONSKY,
on Petition



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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The first opinion of the United States Court of Appeals for the Second Circuit is reported at 173 F. (2d) 324. Said opinion affirmed the judgment of the lower Court, but withheld mandate until the decision in *Cosmopolitan Shipping Co. Inc.*, v. *McAllister*, 337 U. S. 783, 93 L. Ed. 1278.

On July 15, 1949, the United States Court of Appeals for the Second Circuit rendered its second opinion on motion by American Export Lines, Inc., for reargument or in the alternative, for rendition of mandate reversing the judgment and dismissing the complaint. Said opinion is unreported, set forth in the original transcript on page 599.

On the 4th day of October, 1949, Petitioner moved the United States Court of Appeals for the Second Circuit to certify two questions to this Court pursuant to 28

U. S. C. 346, which motion was denied from the bench on the ground that the proper procedure herein is to petition for a Writ of Certiorari.

Jurisdiction

The judgment of the Court below was entered on the 16th day of August, 1949, predicated on the opinion dated July 15, 1949, referred to above.

The jurisdiction of this Court is invoked under *Section 2, Article III of the Constitution of the United States, Section 1333 (1) of new Title 28, Judiciary and Judicial Procedure, and 28 U. S. C. 1254 (1).*

Jurisdiction is further invoked under and by virtue of Rule 38, subparagraph 5 (b) of the Rules of the Supreme Court, Title 28 Judicial Code and Judiciary.

Questions Presented

The issues are resolved from a factual situation in which a seaman lost his life aboard a vessel, owned by the United States of America, by reason of the carelessness, recklessness and negligence of the shoreside employees of the General Agent, respondent herein, employed by the said General Agent as watchmen, while said vessel was on a restricted basis in the Port of Boston, Massachusetts.

The questions asked in this Petition are the same as those presented in the motion to the Court below for certification, to wit;

> "Is a General Agent liable in tort for the negligence of its shoreside employee under State or Federal law, when such tort results in injury or death to a seaman in the course of his employment aboard a vessel of the United States?"

"Does a Federal District Court sitting on the common law side have jurisdiction over an action involving the death of a seaman aboard a vessel in the navigable waters of the United States, caused by the negligent act of a person not in the employ of the decedent's employer?"

The action is predicated upon a maritime tort and the trial Judge's charge to the jury directly referred to the imputed maritime tort of the General Agent by setting forth that the only charges of negligence asserted were the following:

"1. That the defendant failed to maintain and keep proper and adequate fire watches;

2. That the defendant failed to discover promptly the fire on the vessel, and,

3. That the defendant failed to take prompt action to extinguish the fire."

There seems to be a substantial conflict on these questions between the different circuits when one compares the following cases.

Lynch v. *United States* (1947), 163 F. 2d 97;
Puleo v. *H. E. Moss & Co.* (2d Cir., 1947), 159 F. 2d 842;
Vitozi v. *Balboa Shipping Co.* (1st Cir., 1947), 163 F. 2d 286;
Meyers v. *Pittsburgh SS. Co.* (6th Cir., 1948), 165 F. 2d 642.

The uncertainty of whether to apply state or federal law has been expressed by Chief Judge Learned Hand of

the United States Circuit Court of Appeals for the Second Circuit in the case of *Cannella* v. *Lykes Bros. S.S. Co.* 1949, 174 F. (2d) 794, 796 wherein he states:

> "A puzzling preliminary question comes up: i. e., whether the rights and duties arising from the incident are determinable by the law of New Jersey—the ship having been moored to a New Jersey pier—or by the maritime law. There can be little doubt that, so far as anything remains of the dubious doctrine which had its origin in Southern Pacific Co. v. Jensen, the maritime law would prevail; on the other hand, if that doctrine has entirely disappeared, the law of New Jersey alone may be relevant. In Seas Shipping Co. v. Sieracki, supra, the court treated the maritime law as the measure of the owner's liability, and we should have no hesitation in assuming the same thing here, were it not for Caldarola v. Eckert, which left the answer open, though it did hold that the interpretation of the 'operating contract' was a federal question."

The reference to the case of *Caldarola* v. *Eckert*, refers to a decision of this Court reported at 332 U. S. 155, 67 S. Ct. 1569.

A further basis which invokes the jurisdiction of this Honorable Court is found in Rule 38, subparagraph 5 (b) of the Rules of this Court inasmuch as the questions raised herein are important questions of federal law which have not been, but should be, settled by this Court, and further that the Court below has decided a federal question in a way probably in conflict with applicable decisions of this Court.

Stage in the Proceedings When Questions Arose

The issues of the above entitled action were brought on for trial before Hon. Alfred C. Coxe and a jury in the United States District Court for the Southern District of New York and on the 17th day of December, 1947, resulted in a verdict in favor of the Petitioner in the sum of $65,170-.00, which by consent was reduced to $59,670.00.

On February 28, 1949, the United States Court of Appeals for the Second Circuit affirmed the judgment on the jury's verdict in the opinion referred to above (173 F. (2d) 324), and withheld mandate pending the decision of this Court in the case of *Cosmopolitan Shipping Co. Inc.* v. *McAllister, supra.*

After June 27, 1949, when this Court handed down the *McAllister* decision, the United States Court of Appeals for the Second Circuit on July 15, 1949 reversed judgment on appeal in favor of plaintiff and stated that it may be possible under the doctrine of *Hurn* v. *Oursler,* 289 U. S. 238, "that the court can retain jurisdiction of the cause as one arising under the law of Massachusetts, despite the lack of diversity of citizenship of the parties. On this question we intimate no opinion but we believe that the plaintiff should be permitted to present it to the district court, if he so desires."

On the 4th day of October, 1949, Petitioner moved the United States Court of Appeals for the Second Circuit to certify the questions referred to above, which was denied on the ground that the proper procedure is the present petition.

Statement of Facts

The action was brought on behalf of the Petitioner as Administratrix for damages for the death of her husband, Captain James J. Casey, master of the S.S. Morris Sigman on January 13, 1945, as the result of a fire in the captain's quarters in the early morning of January 13, 1945.

The vessel was on a restricted basis beginning midnight of January 12, 1945, while in the Port of Boston, and it was intended that she would sail at about 6:00 a.m. on January 13, 1945.

Captain Casey was a resident of the State of New York, 27 years of age, and suffered death in his cabin as a result of flame burns (fols 349, 350).

United States Custom Officer Ralph L. Connolly saw Casey in the ship's mess hall at 2:00 a.m. (fols. 1393, 1394); that Casey was sober; that he did not do any drinking (fols. 1394 to 1396), and that Casey left at 3:30 a.m. (fol. 1395) at which time he understood that Casey was going to bed (fols. 1423 to 1425).

According to the ship's log, Exhibit 18, and the official report made by Custom Officer Connolly, the fire was discovered at 3:55 a.m. (fol. 1399).

It would appear that the fire had started long before then, for 3:55 a.m., is the time that the respondent's witness, James Haug, watertender, saw smoke coming through a speaking tube in the engine room (fols. 422, 443).

Respondent's witness Horace W. Hutchins, fire protection engineer of Massachusetts Fire Department said that it would take some time for the smoke to travel from the scene of the fire through the speaking tube to where it was discovered by Haug in the engine room. He said he guessed the time would be from 30 to 60 minutes for smoke to travel that distance (fols. 1222 to 1224).

The alarm was not given until 4:05 a.m. (fol. 115).

William F. Quigley, Deputy Chief of the Boston Fire Department, testified that from his examination, the fire started in the vicinity of the Captain's bunk (fol. 1126).

The Captain's body was found about 20 feet away from the bed, near the door of the adjoining room and the appearance of the body indicated that the Captain had collapsed while attempting to get out of his office (fols. 1147, 1148).

The respondent provided two shoreside employees as fire watchmen, as testified to by the Chief Steward (fol. 267) and admitted by Sibley, second officer (fol. 541).

These watchmen, instead of attending to their duties in watching out for fires, remained in the mess hall (fol. 234, 235) where they were seen by Porter for some time before the fire was discovered (fol. 234), and they were not seen around at the time of the fire, as testified to by Sibley (fol. 620).

Captain Dominick McDonagh, called as an expert on behalf of the petitioner, testified that the port security regulations promulgated in Title 33, Code of Federal Regulations, 6.330, provided that these watchmen maintain a continuous guard (fols. 250, 253) and were not to leave their post until properly relieved (fol. 262), that if these men had kept their post they could easily have discovered the fire when it first started (fols. 276, 277).

Dr. Gettler unequivocally stated that Casey did not die from carbon monixide poisoning, but from burns of the body and extremities (fol. 360), and that a delay of from 20 minutes to one-half hour in reaching Casey was the competent producing cause of his death (fol. 361).

The death certificate also gave "flame burns of body and of extremities" as the cause of death (fols. 349-350).

There is no dispute nor evidence to the contrary as to the fact that Joseph D. Gagnon and Robert D. Watt were

watchmen employees of American Export Lines, Inc., for the purpose of patrolling the vessel from 3:00 p.m. on January 12, 1945 until after the fire (fols. 1275, 1277, 1329).

The respondent set forth that it was acting as General Agent of the United States Government, the owner of the vessel, by the production in evidence of the general form of General Agency Agreement (Defendant's Exhibit D, marked at fol. 907).

The trial Judge stated that the first charge of negligence, "that the defendant failed to maintain and keep proper and adequate fire watches" referred to the shoreside employees of the defendant employed as watchmen (fols. 1596-1598).

He stated further that the second charge of negligence, "that the defendant failed to discover promptly the fire on the vessel" was one that "primarily concerns the thoroughness or lack of thoroughness of the work of the two shore watchmen" (fols. 1599 to 1600).

As to the third charge of negligence asserted "that the defendant failed to take prompt action to extinguish the fire", the charge expressed that this had to do with the failure of pressure on the fire hose which the testimony showed was caused by the absence of Haug, the engine room fireman, in his attempt to find a shore watchman to report on smoke coming from the speaking tube in the engine room (fols. 171, 472, 485, 1591).

The trial Judge had previously stated that "the whole basis of the action is negligence" (fol. 1585) and so charged pursuant to the respondent's requests (fols. 1535, 1538).

The sixth allegation of the complaint sets forth a cause of action under general maritime law, (fol. 14) and the ninth allegation states that the action was brought under the Jones Act "and the various statutes governing actions for wrongful death."

Specification of Errors to Be Urged

The United States Court of Appeals for the Second Circuit erred:

1. In holding that the verdict for petitioner could not stand by reason of the decision in *Cosmopolitan Shipping Co. Inc.* v. *McAllister, supra.*

2. In failing to hold in consonance with the case of *Brady* v. *Roosevelt Steamship Co. Inc.*, 317 U. S. 575, as expressed by Mr. Justice Reed in *Cosmopolitan Shipping Co. Inc.* v. *McAllister, supra,* "that an action could be maintained against agents of the United States at common law for the agents' own torts."

3. In referring to the "unexpressed theory of pendent jurisdiction such as is applied in copyright and trademark cases. *Hurn* v. *Oursler*, 289 U. S. 238, 53 S. Ct. 586, 77 L. Ed. 1148 • • • " *McDonald* v. *Cape Cod Trawling Corp.*, 71 F. Supp. 888, 891.

4. In failing to hold that vessels engaged in interstate and international commerce while in navigable waters of the United States are not limited by any local death statute which disrupts the uniform and characteristic features of the maritime law, and is discriminatory, and is not applied within the ambit of the federal maritime law.

5. In failing to hold that when Courts, whether sitting in admiralty or at law, apply local death statutes as sup-

plementing the maritime law, they must nonetheless apply such statutes within the ambit of the federal maritime law, including its characteristic feature of comparative negligence.

6. In failing to retain jurisdiction of a general maritime cause of action in conformity with the case of *Sieracki* v. *Seas Shipping Co.*, 3rd Cir. 149 F. (2d) 98-99, affirmed by this Court in 328 U. S. 85, 66 S. Ct. 872.

7. In failing to hold that a Federal District Court retains jurisdiction of all matters which fall within the maritime law as set forth in *Article III, Section 2 of the Constitution of the United States, and 28 U. S. C. Section 1333 (1).*

8. In failing to hold that a general maritime tort prompts jurisdiction in a Federal District Court for a trial by jury despite lack of diversity. *Sieracki* v. *Seas Shipping Co., supra* and Article VII of the Constitution of the United States.

9. In failing to hold that the law to be applied in supplementing the maritime law is the law of the residence of the owners of the vessel, being the United States of America, and consequently not the law of the State of Massachusetts. *Fisher* v. *Fisher*, 250 N. Y. 313, and the cases cited therein.

10. In failing to affirm the judgment based on a jury verdict which the trial Court ruled was in accordance with the law and supported by the evidence, particularly where the United States Court of Appeals for the Second Circuit, in its first opinion, had affirmed the verdict on the evidence.

Reasons for Granting the Writ

The Court below affirmed the verdict for the petitioner on the facts, but withheld its mandate on a question of law for the reason expressed in the next to last paragraph of its opinion (173 F. (2d) at p. 328), to wit, this Court's decision in *Cosmopolitan Shipping Co. Inc.*, v. *McAllister, supra,* on whether "the Court lacked jurisdiction."

The *McAllister* decision was erroneously deemed determinative of the question of jurisdiction herein, as it dealt with an entirely different situation, the liability of a General Agent under and by virtue of the *Jones Act* (46 U. S. C. 688) wherein there was *not* involved a maritime tort of the General Agent's shoreside employees. The principle of law laid down in *Brady* v. *Roosevelt Steamship Co. Inc., supra,* as to a General Agent's liability for its own tort, was in fact reaffirmed by this Court in *Cosmopolitan Shipping Co. Inc.* v. *McAllister, supra.*

As the complaint sets forth a good and sufficient cause of action under general maritime law, directly referrable to the requests to charge and the charge on the negligence of the respondent herein, it follows that the Court below erred in failing to affirm the jury's verdict *en toto* where it had previously affirmed the verdict on the evidence.

POINT I

Irrespective of lack of diversity between the parties herein, the nature of the action pursuant to general maritime law brought it properly within the jurisdiction of the District Court.

Article III, Section 2 of the Constitution of the United States extends the power of the United States to all cases of admiralty and maritime jurisdiction. See *Frankel* v. *Shipyard*, 46 F. Supp. 242 aff'd 132 F. (2) 634, cert. den. 63 S. Ct. 1030, 319 U. S. 746.

Before its repeal by Act June 25, 1948, C. 646, Sec. 39, 62 Stat. 992, eff. Sept. 1, 1948, Title 28 U. S. C. 41 (3) granted district courts original jurisdiction "of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of common-law remedy where the common-law is competent to give it * * * The jurisdiction of the district courts shall not extend to causes arising out of injuries to or death of persons *other than the master* or members of the crew, for which compensation is provided by the workmen's compensation law of any State, District and Territory, or possession of the United States." (Italics supplied.)

Sec. 1333 (1) of new Title 28, Judiciary and Judicial Procedure, now refers to any civil case of "admiralty *or* maritime" jurisdiction, saving to petitioner any other remedy to which he would be entitled. This Court in the case of *Panama Railroad Company* v. *Johnson*, 264 U. S. 375, spoke of the "constitutional" admiralty and maritime jurisdiction of the Federal Court, and held that the substantive maritime law by the adoption of the Constitution became the law of the United States.

See:

Meyers v. *Pittsburgh SS. Co. supra,* at page 643;
Knickerbocker Ice Co. v. *Stewart* (1920), 253 U. S. 149, 160, 166;
Washington v. *W. C. Dawson & Co.* (1924), 264 U. S. 219.

It seems that prior decisions had established that in a situation as in the case at bar only federal maritime law was applicable.

Seas Shipping Co. v. *Sieracki* (1946), 328 U. S. 85, 88;
Garrett v. *Moore-McCormack Co.* (1942), 317 U. S. 239, 243, 249;
Just v. *Chambers* (1941), 312 U. S. 383;
Messel v. *Foundation Co.* (1927), 274 U. S. 427, 429-434;
Robins D. D. & Repair Co. v. *Dahl* (1925), 266 U. S. 449, 457;
Carlisle Packing Co. v. *Sandanger* (1922), 259 U. S. 255, 259;
Chelentis v. *Luckenbach SS. Co.* (1918), 247 U. S. 372, 384;
Riley v. *Agwilines, Inc.,* 1947 A. M. C. 1038, 296 N. Y. 402, 73 N. E. 2d 718;
Colonna Shipyard v. *Bland,* 150 Va. 349, 358, 143 S. E. 729;
Intagliata v. *Shipowners & Merchants Towboat Co.,* 1946 A. M. C. 263, 267, 26 Cal. 2d 365, 159 P. 2d 1.

Accordingly, by reason of the authorities cited above, the District Court and the Court below had jurisdiction of the cause of action, irrespective of the lack of diversity between the parties.

POINT II

The District Court had jurisdiction to hear and determine the issues involved on its common law side before a court and jury.

Under and by virtue of 28 U. S. C. 41 (3), the suitor herein was granted the right of a common law remedy "where the common law is competent to give it," and this is re-affirmed in 28 U. S. C. 1333 (1).

Article VII of the Constitution of the United States expresses that in suits at common law "the right of trial by jury shall be preserved."

It is noted that the case of *Sieracki* v. *Seas Shipping Co. Inc. et al,* (two cases) *supra,* concerned an action pursuant to general maritime law against a defendant of diverse citizenship and two corporations having the same citizenship as the plaintiff therein. The plaintiff sued on the law side and the trial was to a court and jury, despite non-diversity between the plaintiff and some of the defendants. There is no adverse comment as to jurisdiction and the right to trial by jury under those circumstances though it is noted that before the testimony was completed in the *Sieracki* case, *supra,* it was stipulated that the court should determine liability as though a jury trial had been waived at the outset. This waiver was not the result of any dispute as to the right to a trial by jury. (See original papers in 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099, Tr. 12, 116, para. 1 & 2 and Tr. 134.)

POINT III

The court below failed to recognize that it had power to affirm the jury's verdict *en toto*, and erred in referring to the Massachusetts law wherein there is a discriminatory limitation on the amount recoverable in death actions and a further provision contrary to the uniform and characteristic feature of the maritime law referring to comparative negligence.

The death statute of the State of Massachusetts imposes a limitation on the amount recoverable in a death action. Acts and Resolves, Mass. 1946, Chapter 614; 1947, Chapter 506.

There is a further provision of local Massachusetts law that in negligence actions, the contributory negligence of the plaintiff results in a complete bar. *Chandler* v. *N. Y., N. H. and H. R. Co.*, 159 Mass. 589, 35 N. E. 89.

It is contended that the Massachusetts law is inapplicable as contrary to the rule of preserving the uniform and characteristic features of the maritime law and is discriminatory in its limitation and by going counter to federal laws and the essential features of an exclusive federal jurisdiction.

In *Just* v. *Chambers, supra,* at page 392, opinion by Chief Justice Hughes, the relationship between general maritime law and actions for wrongful death was expressed as follows:

> "But as admiralty takes cognizance of maritime torts, there is no repugnancy to its characteristic features either in permitting recovery for wrongful death or in allowing compensation for a wrong to the living to be obtained from a tortfessor's estate" (p. 392).

This Court in *Messel* v. *Foundation Company,* 274 U. S. 427, held that though a maritime tort is not excluded from State compensation, the application of the State statute is limited by admiralty law and the *Federal Employers' Liability Act,* 45 U. S. C. 51.

There is no limitation of the amount recoverable under this Act in the event of wrongful death. *Devine* v. *Chicago etc. R. Co.,* 36 S. Ct. 27, 239 U. S. 52.

As the law of the place of residence of the owner of the vessel is applicable in determining *lex loci delicti,* and as the S.S. Morris Sigman was owned by the United States of America on January 13, 1945, it follows that the death statute of the District of Columbia, wherein there is no limitation for recovery for wrongful death may be applied herein. See the discussion of the rule of *Crapo* v. *Kelly,* 83 U. S. 610, by the Court of Appeals of the State of New York in *Fisher* v. *Fisher,* 250 N. Y. 313, and the cases cited therein.

As expressed by Mr. Justice Bradley in his dissent in *Crapo* v. *Kelly, supra,* on page 644, the rule "would apply to a ship in New York Harbor as well as to a ship on the high seas."

If the law of the State of registry of the S.S. Morris Sigman were applied, which State is Maryland (Defendant's Exhibit F), there is no discrimination or disruption of uniformity therein as Maryland does not impose a statutory limitation on recovery for wrongful death. Article 67, Annotated Code of Maryland.

It would be a singular fact if at this time it can be held that by the common law the greatest injury which one man can inflict on another, the taking of his life, could be deemed without a private remedy. To deny the remedy would be contrary to "natural equity and the general prin-

ciples of law." *Cutting* v. *Seabury*, 1 Spr. 522 by Judge Sprague in the Massachusetts District in 1860.

It is clear that general maritime law can not be impaired by local law.

> *Robins Drydock & Repair Co.* v. *Dahl*, 266 U. S. 449, 457;
> *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255, 259.

It has been held by this Court that to the extent that a State compensation statute would conflict with uniformity of maritime matters as expressed in the Constitution, then to that extent such statute is invalid, as maritime law is distinct from the law of several States, not derived from nor dependent on their will and confusion would result where States could declare the rights and liabilities incident to maritime employment.

> *Knickerbocker Ice Co.* v. *Stewart* (1920), 253 U. S. 149, 160, 166;

The local law which is discriminatory is unconstitutional.

> *Washington* v. *W. C. Dawson & Co.* (1924), 264 U. S. 219.

This Court is fully aware of the fact that the federal maritime law grants injured workmen important rights not available under local common law. For illustration, the "established admiralty doctrine of comparative negligence." *Socony Vacuum Co.* v. *Smith* (1939), 305 U. S. 424, 429-430; *Stokes* v. *United States* (2d Cir., 1944), 144 F. 2d 82; *The Henry S. Grove* (D. Md., 1927), 22 F. 2d 444; *cf. Porello* v. *United States* (1947), 330 U. S. 446, 458; *Portel* v. *United States* (S. D. N. Y.), 1949 A. M. C. 487, 491.

This rule forms part of the characteristic principles of the federal maritime law with whose uniform application state law may not interfere. And when courts, whether sitting in admiralty or at law, apply local death statutes as supplementing the maritime law, they must nonetheless apply such statutes within the ambit of the federal maritime law, including its characteristic feature of comparative negligence. Certain outmoded lower court decisions appear to have applied the rule of contributory negligence where state death statutes were involved. *Monongahela Riv. Consol. Coal & Coke Co.* v. *Schinnerer* (6th Cir., 1912), 196 Fed. 375; *O'Brien* v. *Luckenbach SS. Co.* (2d Cir., 1923), 293 Fed. 170; *Truelson* v. *Whitney & Bodden Shipping Co.* (5th Cir., 1926), 10 F. 2d 412, cert. den. 271 U. S. 661; *Groonstad* v. *Robins D. D. & Repair Co.* (1923), 236 N. Y. 52, 139 N. E. 777; *Patrone* v. *M. P. Houlett* (1924), 237 N. Y. 395, 143 N. E. 232.

This point would seem clearly to be an important question of federal law which has not been and should be settled by a decision of the Supreme Court.

Surely in the light of recent decisions of this Court it would seem obvious that the unfavorable lower court decisions referred to would be regarded as destructive of the characteristic uniformity of the federal maritime law and therefore erroneous.

Under all of the circumstances, we feel it would be to the advantage, not only to the litigants herein, but to all persons both employer and employee, engaged in maritime service, as well as their attorneys, to be informed as to which law would be applied, whether state or federal, so that two different litigants with identical rights would not fare differently in different jurisdictions, or for that matter, in the same jurisdiction when heard by different judges.

Under the present uncertain state of the law, different litigants with identical rights are left to happenstance as to their recovery. Furthermore, a great deal of litigation can be obviated if attorneys knew which law would be applied so that they would not be tempted to litigate questions that would otherwise be settled but for the uncertain state of the law.

CONCLUSION

This Petition presents questions of extreme significance as to which the federal courts have expressed uncertainty and on which there is conflict among the different circuits.

The United States Court of Appeals for the Second Circuit has spoken with finality as to the facts of the case, affirming the judgment in favor of the petitioner on the evidence.

As this Court's decision in the *McAllister* case is not determinative of the issues herein, the Court below erred in not issuing a mandate in its first decision, 173 F. (2) 324, 328.

There is error in the lower Court's opinion as to the law of Massachusetts being applicable hereto.

To resolve all these doubts and to the end that substantial justice be meted out to the parties herein, it is respectfully urged that the Petition be granted by this Honorable Court.

Respectfully submitted,

JACOB RASSNER
Attorney for Petitioner.

HARRY EISENBERG and ROBERT KLONSKY,
on Petition

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 387

DOROTHY CASEY, as Administratrix of the Estate of JAMES J. CASEY, deceased,

Petitioner,

v.

AMERICAN EXPORT LINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

KENNETH GARDNER,
Attorney for Respondent.

EDGAR R. KRAETZER,
JAMES M. ESTABROOK,
of Counsel.

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Opinions Below

The opinion of the District Court (R. 558-559) is reported at 1948 A. M. C. 978. The memorandum decision of the Trial Judge (R. 551) is not reported. The first opinion of the Court of Appeals for the Second Circuit (R. 570) is reported at 173 F. 2d 324, 1949 A. M. C. 417. Its opinion on rehearing (R. 612-613) is reported at 176 F. 2d 337, 1949 A. M. C. 1510.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered July 15, 1949 (R. 613). The petition for writ of certiorari was filed October 12, 1949. The jurisdiction of this Court is invoked under 28 U. S. Code 1254(1).

Questions Presented

Petitioner seeks to present the following two questions:

1. Is the liability of respondent, a general agent of the United States, for the negligence of its shoreside employee governed by state or by federal maritime law when such negligence results in the death of a government employed seaman in the course of his duties aboard a vessel operated by the United States?

2. Does a United States District Court, in the absence of diversity of citizenship, have jurisdiction of a civil action against respondent for the wrongful death of such a seaman on board a vessel in navigable waters of the United States?

Statement

Respondent, American Export Lines, Inc., was a ship's husband or General Agent appointed by the United States under the standard form of agreement to manage the accounting and other shoreside business of the SS. *Morris Sigman* and other vessels operated by the United States through the War Shipping Administration (R. 303).[1]

[1] War Shipping Administration Form GAA 4-4-42, 7 Fed. Reg. 7561-7562, 46 C. F. R. 1943 Cum. Supp., p. 11427, sec. 306.44.

Petitioner's decedent met his death on January 13, 1945, while serving as Master on board the SS. *Morris Sigman* then moored in the port of Boston, Massachusetts.[2]

Petitioner commenced an action at law in the United States District Court for the Southern District of New York. The complaint alleged that she had been duly appointed administratrix of the estate of the decedent by the Surrogate of the County of Queens, State of New York, and that respondent was a corporation organized and existing under and by virtue of the laws of the State of New York with its principal place of business in the Borough of Manhattan, City and State of New York (R. 4). It specifically averred that the action was brought pursuant to 46 U. S. Code 688, commonly known as the Jones Act, and the various statutes governing actions for wrongful death (R. 6). It alleged that respondent "was the charteree and/or the agent of the SS. *Morris Sigman* and operated, managed and controlled said vessel", and that petitioner's intestate "was in the employ of defendant [respondent] on board the aforementioned vessel, having prior thereto signed regular shipping articles to serve thereon in the capacity of Master"; that on or about January 13, 1945, at 4 o'clock in the morning, while petitioner's intestate was on board the *Morris Sigman* in the course of his employment, a fire broke out, as a consequence of which petitioner's intestate suffered injuries resulting in his death (R. 5).

The complaint specified that the injuries resulting in the death of petitioner's intestate were caused by the negligence of respondent, its agents, servants and employees in (a) failing to provide proper and adequate fire fighting equipment, (b) failing to maintain and keep proper and

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[2] Employment on a government owned vessel operated by the War Shipping Administration as successor to the Maritime Commission made petitioner an unclassified civil service employee of the United States. Civil Service Rules, Schedule A, sec. xxi (1), Executive Order No. 9004, 7 F. R. 2; Executive Order No. 9247, 7 F. R. 837; 5 C. F. R., 1943 Cum. Supp. p. 1488, sec. 50.21.

adequate fire watches and fire protection, (c) failing promptly to discover the fire, (d) failing to take prompt action to extinguish the fire, (e) failing to take prompt action to rescue and save petitioner's intestate, and (f) failing to inspect the vessel's appliances, materials and equipment to determine the existence of any unsafe and unseaworthy conditions (R. 5).

Respondent's answer (R. 8-9) admitted that it was a New York corporation and that a fire broke out on the vessel while petitioner's intestate was on board in the course of his employment and duties. It denied that respondent operated, managed and controlled the vessel, denied that petitioner's intestate was in respondent's employ, denied all allegations of negligence and unseaworthiness and alleged that respondent acted only as General Agent of the United States pursuant to the terms of an agreement in writing.

The trial commenced December 2, 1947, resulting in a judgment on the verdict in favor of petitioner, entered December 17, 1947. The testimony showed that in addition to the ship's company, all of whom had signed articles with the Master as representative of the War Shipping Administration as operating owners of the *Morris Sigman* on the voyage, there were also aboard two watchmen who, although employed by respondent, were under the exclusive direction and control not of respondent, but of the United States, acting through the master and officers of the vessel (R. 105, especially f. 315) in accordance with the Coast Guard Regulations for the Security of Vessels in Port (33 C. F. R., Sec. 6.380).

At the close of the trial, the District Court denied respondent's motion to dismiss (R. 504). Three issues of negligence were submitted to the jury by the court's charge (R. 529).

1. That the defendant [respondent] failed to maintain and keep proper and adequate fire watches;

2. That the defendant [respondent] failed to discover promptly the fire on the vessel, and

3. That the defendant [respondent] failed to take prompt action to extinguish the fire.

As to the first charge concerning the fire watches, the court explained that "The principal basis of this charge is * * * that the defendant [respondent] did not comply with the Coast Guard Regulations with respect to sea watches" (R. 532-533). This included not only whether or not the watchmen patrolled their post, but also whether the ship's officer should have actually been on active patrol during his watch and whether there was an engineer actively on watch (R. 533). Similarly, as to the second charge regarding the failure promptly to discover the fire, the court stated it concerned primarily the thoroughness, or lack of thoroughness of the work of the two shore watchmen, but "also it concerns, to some extent, the action of the other persons on watch at the time" (R. 534). Finally, as to the third charge, failure to take prompt action to extinguish the fire, the court said it dealt with the condition of the ship's fire hose and the promptness with which water pressure was delivered by the fire pumps (R. 534). The court made no suggestion that either of these two items involved the watchmen for they were exclusively under the control and operation of members of the crew.

The District Court ruled that the case was governed by the decision of this Court in *Hust* v. *Moore-McCormack Lines*, 328 U. S. 707, despite the fact that injury which resulted in the death of the deceased occurred subsequent to the effective date of the Clarification Act, March 24, 1943 (R. 551). Consequently, the issues of liability were treated as being whether the agents, servants and employees of the owner and operator of the SS. *Morris Sigman*, were negligent in connection with the death of petitioner's decedent and, if so, as requiring a verdict against respondent, the General Agent. Following the

entry of judgment in favor of petitioner, judgment was reduced by striking therefrom the provision as to interest from the date of death (R. 560) and also by the sum of $5,500, representing payment already made to petitioner by virtue of war risk insurance (R. 561). On appeal the United States Court of Appeals for the Second Circuit first affirmed (R. 570), but withheld mandate pending decision by the United States Supreme Court in the case of *Cosmopolitan Shipping Co.* v. *McAllister,* 337 U. S. 783. When that decision overruled the *Hust* case, the Court of Appeals reversed the judgment of the District Court and remanded the matter for further proceedings, leaving open the question of jurisdiction of the cause "as one arising under the law of Massachusetts despite the lack of diversity of citizenship of the parties" (R. 612).

The record is thus entirely barren of any submission to the jury of any question of respondent's own negligence. The sole question presented to the jury was the negligence of the United States, operator of the SS. *Morris Sigman* and it was assumed, following *Hust* v. *Moore-McCormack Lines, supra,* that any negligence chargeable to the operating owner would equally make respondent liable.[3]

Argument

Petitioner's intestate, a civil service employee of the United States, serving as shipmaster of a government operated vessel, met his death aboard his vessel in Boston Harbor. Petitioner recovered a judgment in the District Court under the Jones Act (46 U. S. Code 688). The court below reversed in reliance upon *Cosmopolitan Shipping Co.* v. *McAllister,* 337 U. S. 783, but remanded the cause

[3] Petitioner's suggestions (Pet. 2, 10, 11, 15) that the question of the negligence of respondent's shoreside employees was raised on the record is contrary to fact. The only question raised was the liability of the operating owner of a vessel under the Jones Act (46 U. S. Code 688), which was assumed in accordance with the *Hust* case, to involve the liability of respondent.

for further proceedings under Massachusetts law, provided the District Court should determine it had jurisdiction in the absence of diversity of citizenship. Petitioner apparently asks that this Court grant certiorari and instruct the District Court (a) that the applicable law is the federal maritime law incorporating the wrongful death statute of the state to which the vessel belongs, rather than Massachusetts, the state where the death occurred, and (b) that the case being one governed by federal maritime law, the case arises under the Constitution, laws and treaties of the United States and falls within the jurisdiction conferred by 28 U. S. Code 1331. We submit that in the present posture of the case petitioner's demand in effect is but a request for an advisory opinion by this Court and does not merit the granting of the writ.

1. *The questions sought to be presented are not raised by the record.* Conceding arguendo the importance of the questions for which petitioner seeks review and the existence of a conflict concerning them, it does not follow that they require or even permit resolution on the record now at bar. On the contrary, the record shows that there has been no determination of the controlling facts necessary to found liability of respondent and that what petitioner really seeks is little more than an advisory opinion (cf. Pet. 18-19).

The evidence in the record might permit a finding of negligence of either the vessel personnel employed by the United States, of the watchmen employed by respondent, or of both (see opinion below, R. 573). The charge of the trial judge authorized the jury to return a verdict against respondent if they found negligence of *either* the vessel's personnel or of the watchmen (R. 532-534). It is impossible, therefore, to know which employee group or groups the jury found to be negligent, yet it is now settled by *Cosmopolitan Shipping Co.* v. *McAllister, supra*, that if the negligence were solely that of the vessel's personnel, respondent is not liable for it is not their principal. Absent

a finding that others than members of the crew were negligent, respondent cannot be held liable under any law or in any court.

But even if it were established that negligence of the watchmen employed by respondent contributed to Casey's death, it would not follow that respondent must be liable for their negligence. No matter what the applicable law, be it the common law of Massachusetts or the federal maritime law, the record (cf. esp. R. 105) together with the applicable Coast Guard Regulations for the Security of Vessels in Port (33 C. F. R., Sec. 6.380), indisputably establishes that the watchmen were under the exclusive supervision and control of the mate, representing the United States as operating owner of the vessel, and respondent had no authority or control over them in respect of the acts in the course of which their alleged negligence occurred. It follows that such negligence, if any there was, falls within the loaned servant rule, and only the United States, who exercised control over the watchmen, and not respondent, who was only their general employer, is liable therefor. *Standard Oil Company* v. *Anderson,* 212 U. S. 215; *Denton* v. *Yazoo and Mississippi Valley R. R. Co.,* 284 U. S. 305.

2. *The case involves no question of conflict or of general importance.* The decision of the court below remanding this matter to the District Court without deciding the question of jurisdiction cannot be in conflict with the decision of any other Court of Appeals in the same matter, nor has it decided an important federal question, nor departed from the accepted and usual court and judicial proceedings so as to call for an exercise of this Court's power of supervision. All that has been done is to remit petitioner to the District Court there to determine whether absent diversity of citizenship there is jurisdiction of a cause of action founded on the Massachusetts death statute and if so to adjudicate it.

So far as concerns the law to be appealed, the applicability of the Massachusetts Wrongful Death Act to a death on navigable waters of the United States within the territorial limits of Massachusetts is settled beyond question by decisions of this Court. In *Just* v. *Chambers*, 312 U. S. 383, a unanimous court has but recently held that the death of a shipowner did not terminate a right of action for personal injuries against him and confirmed the applicability of the local death statute. The court applied the Florida survival statute since the accident occurred in Florida territorial waters. The court first referred to the well known proposition that state wrongful death statutes create a right in admiralty, citing *The Hamilton*, 207 U. S. 398, and *Western Fuel Co.* v. *Garcia*, 257 U. S. 233-242. It continued (312 U. S. at 388):

> "And this Court, upon an elaborate review of the decisions, concluded that no suit for wrongful death would lie 'in the courts of the United States under the general maritime law'."

The court then summarized the settled law (at p. 391):

> "The admiralty rule in the case of wrongful death can be stated either negatively or positively, and the result does not turn on the mere mode of expression. The pith of the matter is that the maritime law, as we conceived it, did not permit recovery, and in the same sense, in substance, the maritime law denied the survival of causes of action against a deceased tort feasor. The maritime law would be supplemented or modified by state legislation in the one case as truly as in the other, and either supplement or modification is permissible in accordance with the accepted criterion."

See also, *American Stevedores, Inc.* v. *Porello*, 330 U. S. 446, 460; *Spencer Kellogg Co.* v. *Hicks*, 285 U. S. 502, where the New York Decedent's Estate Law was applied in actions for wrongful death of persons killed in territorial waters of the State of New York.

So far as the question of jurisdiction in the absence of diversity is concerned, petitioner can cite only the case of *Seas Shipping Company* v. *Sieracki*, 328 U. S. 85. There, the District Court sitting at law without a jury entertained jurisdiction between residents of the same state. But, the jurisdictional point was nowhere raised on the record, and petitioner concedes there was no jury (Pet. 14). For all practical purposes under the practice now followed by the District Courts, it would have been surplusage to raise the question of jurisdiction in *Sieracki* because the matter would have merely been transferred to the admiralty side of the same court where the court sitting without a jury would have jurisdiction since the accident occurred on navigable waters. No case is cited by petitioner where the admiralty and maritime jurisdiction granted by 28 U. S. Code 1333(1), former 28 U. S. C. 41(3), has been held to sustain jurisdiction of the District Courts at law in the absence of other jurisdictional requirements. In the case at bar the complaint does not involve the admiralty or maritime jurisdiction of the United States, but jurisdiction under 46 U. S. Code 688, the Jones Act (R. 6). And obviously, petitioner at the trial proceeded under the Jones Act alone.

Moreover, authorities involving personal injuries, for which a remedy was furnished under the federal maritime law, are not in point as to the question involving a cause of action for wrongful death for which no remedy was furnished historically by the general maritime law. The remedy for death was the creature of the wrongful death statute of whatever state wherein the death occurred. Where death occurred on the high seas, then the wrongful death statute of the state to which the vessel belonged, or subsequent to its adoption, the Death on the High Seas Act (46 U. S. Code 761) was applied. *The Hamilton, supra.*

3. *Petitioner has an adequate remedy without recourse to this Court.* For yet another reason, the facts of this case do not justify review by this Court. In addition to

her suit against respondent, petitioner has pending a second suit under the Jones Act, timely filed against the United States as operating owner in possession of the vessel and employer of its master and crew. In that suit petitioner may recover on proof of negligence without regard to any of the disputed questions of applicable law and existence of federal jurisdiction which she now seeks to raise in this Court. The existence of such a pending suit further confirms that what petitioner is asking here is in fact only an advisory opinion as to the law and jurisdiction for the guidance of other litigants in other cases (see Pet. 18-19), not for the disposition of the present case.

CONCLUSION

The decision below is correct and there is no conflict. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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